80 Box 30 - JGR/Judges (2) – Roberts, John G.: Files SERIES I: Subject File

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

January 11, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Reappointment of Claims Court Judges

This responds to your request for an analysis of the controversy which has arisen over the nominations of Judges Yock, Merow, and Colaianni for reappointment to full 15- year terms on the Claims Court. The act which transformed the old Court of Claims into the Claims Court provided that existing Court of Claims commissioners would automatically become judges in the Claims Court, for terms with staggered expiration dates (see Tab 1 of Rose memorandum, attached). Under this scheme seven vacancies would arise before the November 1984 election, nine thereafter. The Department of Justice determined, however, that under the act the "grandfathered" judges could resign prior to the expiration of their foreshortened terms and be reappointed to full 15-year terms. The terms of Yock, Merow, and Colaianni expire after 1984, so the Democrats may have expected the winner of the 1984 Presidential election to appoint judges to fill their seats. By resigning and being renominated by President Reagan, these three have given the President seats to fill that otherwise may have been filled by a Democrat.

When the three names were sent up, Congressman Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, objected to Senator Dole, Chairman of the Senate Subcommittee on Courts, that the resignation-reappointment procedure violated a congressional understanding, embodied in the staggered expiration dates, that "half of the new judges would be appointed after 1984." Dole thereupon wrote Senator Thurmond, objecting to further consideration of the three nominees (Tab 2 of Rose memorandum). Congressman McClory thereupon wrote to Thurmond (Tab 3 of Rose memorandum), objecting to Dole's view that any understanding existed on an appointment split. McClory wrote that he was aware of no such agreement and that in any event the expiration dates led to a 7-9, not 8-8 split. Kastenmeier responded to Dole, reiterating his view that a "legislative understanding" existed (Tab 3 of Rose memorandum). McClory then responded directly to Kastenmeier (with a blind copy and note to you),

refuting Kastenmeier's arguments. McClory pointed out that the resignation-reappointment procedure promoted stability on the Claims Court -- an objective of the grandfathering provision -- and that the statute specifically provided that the transition judges would serve "until a successor is sworn or until reappointed."

It is clear that nothing in the statute or legislative history bars the resignation-reappointment procedure. As McClory points out, the grandfathered judges serve "until a successor is sworn or until reappointed." Furthermore, there is only tenuous support for the supposed "legislative understanding." Thurmond, McClory, and Railsback were unaware of it. The Court of Claims bar -- involved in the legislative process -- formally recommended immediate reappointment of all the grandfathered judges. According to a memorandum from Assistant Attorney General Jon Rose to the Attorney General on this subject (attached), neither Dole nor his staffer Peter Velde were even aware of the "understanding," until recognition of it served their interests in negotiations with Kastenmeier over a bankruptcy courts bill. Kastenmeier and Dole themselves both misstate the understanding as an 8-8 split, when the expiration dates actually result in a 7-9 split. Staggered expiration dates serve the articulated purpose of giving some stability to the new court -- a purpose promoted by the resignation-reappointment procedure -- so there is a reason for staggered expiration dates other than the one alleged by Kastenmeier. Finally, if in fact the draftsmen had agreed to split the appointments, that result could have easily been achieved through a common legislative device: providing that any appointments to fill vacancies in a transition term be only for the unexpired remainder of that term.

Kastenmeier's asserted understanding, therefore, was: (1) not reflected in the statute, (2) not reflected in the legislative history, (3) not generally understood, and (4) could easily have been included in the statute -- but was not. I would strongly oppose any efforts to infringe upon the President's appointment powers out of deference to such unsubstantiated legislative "understandings."

THE WHITE HOUSE

WASHINGTON

Date 1.7.83

Suspense Date ______

MEMORANDUM FOR: John

FROM: **DIANNA G. HOLLAND**

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COMMENT

Ed would like for you to analyze these letters situation and prepare a case.

Thanks

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Subject: Recollections of agreement/understanding with regard to appointment of judges to the U.S. Court of Claims

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TELECOPIER (202) 338-1296
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January 5, 1983

Dear Fred —

As you can see, I'm passing this Court of Claims subject in a manner which I feel is consistent with our Republican Administration's best interests. At the same time I'm endeavoring to project accurate and above-board information. That, seems to me, to be important.

Sincerely —

Bill McClary

(My new Connecticut)

ROBERT McCLORY
13TH DISTRICT, ILLINOIS

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Washington, D.C. 20515

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January 5, 1983

The Honorable Robert W. Kastenmeier
U. S. House of Representatives
Washington, D. C. 20515

Dear Bob:

You have been kind enough to forward me a copy of your letter of December 28th to Senator Dole recalling your recollections of a tacit agreement or understanding which is reported to have been reached between you as House manager of H.R. 4482 and Senator Dole.

In reviewing the events which surrounded the final passage of H.R. 4482, including discussions with other Committee members and staff, as well as my personal recollections, I have been unable to find support for the view that the initial judges of the United States Claims Court would all be required to serve until October 1, 1986, before consideration could be given to their appointment to 15-year terms by the President with the advice and consent of the Senate. The specific part of your letter with which I can find no confirmation, much less a "legislative understanding" is that "half of the new judges would be appointed after 1984, ..."

There appears to be some misunderstanding as to the statutory transition arrangement incorporated in Public Law 97-164 for the Claims Court. Under this legislation, the persons who became the initial judges of the Claims Court on October 1, 1982, were those 16 sitting trial judges who then comprised the Trial Division of the United States Court of Claims. These persons had each been appointed a trial judge (commissioner) by the United States Court of Claims under 28 U.S.C. 792, which provided that they "shall be subject to removal by the Court and shall devote all their time to the duties of the office." In practice, as reported recently in a study of the new Claims Court by the Bureau of National Affairs, this prior system "afforded life tenure during good behavior, and no trial judge was ever removed from office involuntarily." (38 Federal Contract Reports 794 (1982)).

The 16 judicial positions created for the new Claims Court under Public Law 97-164 were established to have Presidential appointments for 15-year terms (Article I status) rather than life tenure, but as a transition measure, these positions were initially to be staffed by the 16 sitting Court of Claims trial judges without requiring any new appointment of these persons. House Report No. 97-312, 97th Cong., 1st Sess., p. 26, states, "It is important to characterize the Claims Court grandfathering clause for what it really is. It merely continues the trial commissioners in office as judges of a reorganized court, with additional authority, for a limited transition period."

As under the Constitution, Congress may not appoint judges, Buckley v. Valeo, 424 U.S. 1, 118-36 (1976), and the initial Claims Court judges were not appointed by the President, they continue to serve only under their prior appointments by the Court of Claims. House Report 97-312 states at p. 26, n.29, "The bill merely would confer 'germane' new duties and extend the tenure of the existing trial commissioners as permitted by Shoemaker [Shoemaker v. United States, 147 U.S. 282 (1893)] rather than create a new office."

In short, in H.R. 4482, Congress expressly recognized that a Claims Court judge now holds the same office previously held as a trial judge of the Court of Claims. Clearly then, by continuing the tenure of the persons who have occupied and performed the duties of these positions for substantial prior periods, it could not have been the purpose of the transition clause "to provide an adequate period of time -- at least four years -- for sitting commissioners to establish a record upon which their qualifications to be appointed to a full 15-year term could be based," as is stated in your letter of December 28th. A new appointee to the Claims Court has not been required to serve an initial four-year term before obtaining the regular 15-year term provided for this Court. The initial trial judges of the Claims Court have well established public records covering the prior performance of the duties of this office, on which the President and the Senate can render a judgment as to their qualifications to continue to serve in the federal judiciary, as was contemplated when they were originally appointed to career positions by the Court of Claims.

The transition clause was provided to obtain Presidential appointments and 15-year terms for all of the 16 positions involved over a reasonable period of time so as to avoid disruption in the flow of the complex long-term cases handled by this Court. Appointment of an incumbent judge serves this purpose. Increasing the present number of judges on this Court with Presidential appointments, Senate confirmation, and 15-year terms will contribute to the necessary independence

and stability of this Article I tribunal and will aid the Court in putting efficient case-management techniques into place. This would also be a prudent action considering that questions as to the constitutionality of this Article I Claims Court have already been raised following the decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982). Were it necessary for all the persons now serving transition terms to remain in that status until 1986, some half of the judges now on the Court could conceivably change all at the same time in 1986 -- a situation which does not promote the independence of this tribunal and one which would be most disruptive to the efficient processing of the long-term cases with which this Court must deal.

Public Law 97-164 does not support any disqualification of the incumbent transition judges. In fact, in Section 167, it expressly states that such judges shall continue in office "until a successor is sworn or until reappointed." As Section 167 terminates an incumbent's transition term upon reappointment to a regular term, there is no valid issue of "premature" resignation involved.

Since the overall policy, and one in which you appear to concur, is that the Claims Court judges should be named and confirmed on the basis of their qualifications and not their ideological or partisan persuasion, to preclude Senate consideration of appointments of the most highly qualified until the expiration or near expiration of their transition terms would seem to me to risk the loss of the most capable of the experienced judges who now serve.

I urge you to reconsider your position in this matter.

I am transmitting this letter on my Congressional stationery, notwithstanding the termination of my service as of January 3, 1983. I should add that this legislation, having developed during my service as Ranking Member of the Judiciary Committee, I am most anxious to contribute to its appropriate interpretation and application.

Please reply to me at Baker & McKenzie, 815 Connecticut Avenue, N. W., Washington, D. C. 20006.

With all good wishes.

Sincerely yours,

Robert McClory

RMcC:j

cc: Hon. Robert Dole
Hon. Peter Rodino
Hon. Tom Railsback
Hon. Howell Heflin
Hon. Joseph Biden
Hon. William French Smith
Hon. Strom Thurmond

Blind copy for
Fred Fielding

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Name of Correspondent: Robert Kastenmeier

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Subject: Copy of letter to Robert Dole regarding appointment of judges to the U.S. Court of Claims created pursuant to P.L. 97-164

ROUTE TO: **ACTION** **DISPOSITION**

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Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Telephone: 202-225-3951

December 28, 1982

Honorable Robert Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Bob:

Thank you very much for sending me a copy of your December 2, 1982, letter to Chairman Strom Thurmond regarding our mutual understanding with respect to the appointment of judges to the new U.S. Court of Claims created pursuant to P.L. 97-164.

As you know, the House bill, H.R. 4482, provided that the present commissioners of the Court of Claims would serve until October 1, 1986, at which time the President would appoint judges for a full 15 year term.

The House Judiciary Committee Report, No. 97-312, emphasizes this point and specifies that the President is free to reappoint sitting commissioners to the new court. The specific purpose of the House language was to provide an adequate period of time -- at least four years -- for sitting commissioners to establish a record upon which their qualifications to be appointed to a full 15 year term could be based. It was intended that the record of the judge on the bench, not his ideological or partisan persuasion, was to be considered in his or her reappointment.

The language of the House report reflects the understanding of the House Committee. During the course of debate in the Committee, the ranking minority Member of the Subcommittee, Honorable Tom Railsback, specifically stated, in referring to the commissioners, "We actually grandfather them in for about a five-year period..." The House bill was approved by the Committee in 1981, thus accounting for Tom Railsback's reference to a five-year grandfather provision.

In working out our differences with the Senate-passed bill, we agreed to compromise by providing that half of the new judges would be appointed after 1984, thus promoting in large measure the policy of the House bill as reflected in the Committee Report and giving the Administration immediate appointment authority for some judges.

The artificial resignation and reappointment of judges prior to the expiration of their present terms specifically violates the understanding I, as the House manager of the bill, entered into with you as to the resolution of the differences between the House and Senate versions of the bill, and I commend you for recognizing our understanding in your letter to Chairman Thurmond. Should such legislative understandings continue to be abrogated by the Administration, I seriously doubt that the spirit of bipartisan cooperation which is reflected in H.R. 4482 and P.L. 97-164 can continue -- a spirit of cooperation to which the President made specific reference in his statements when signing the bill into law.

Warm regards,

Sincerely yours,

ROBERT W. KASTENMEIER
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:blr

cc: Hon. Joseph Biden
Hon. Howell Heflin
Hon. Peter Rodino
Hon. Robert McClory
Hon. Tom Railsback
Hon. William French Smith

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

January 6, 1983

TO: William French Smith
Attorney General

FROM: Jonathan C. Rose JCR
Assistant Attorney General

SUBJECT: Reappointment of Claims Court Judges -- Senator Dole's Objections

This memorandum discusses Senator Dole's objections to the President's recent nomination of three sitting Claims Court judges, whose terms expire after 1984, to full 15-year terms.

I. Background

The Federal Courts Improvements Act of 1982 (the "Act") established the United States Claims Court as a new Article I court to hear cases previously handled by the trial section of the old Court of Claims. Rather than have all 16 judges appointed immediately, the Act made the Court of Claims trial judges (commissioners) judges of the new court, and staggered the expiration dates of their terms over a four-year period. The expiration dates are shown at Tab 1.

When we reviewed the Act, it became apparent that the President was empowered to reappoint sitting judges whose terms were not scheduled to expire for three or four years. This would be accomplished by a judge resigning and then being reappointed to his own vacancy for a full 15-year term. In effect, this would extend a judge's term from, for example, 1986 to 1998. This course of action initially was suggested by former Senators Fong and Taft as a way of securing the positions of the four Republicans then on the court, whose terms otherwise would expire after the 1984 election.

Instead of reviewing only the Republicans, we reviewed the qualifications of all sitting judges and chose three as suitable for reappointment. They are Judges Merow, Yock, and Colaianni. All are Republicans, although Colaianni is less well identified as such; we did not know his party registration until

after the decision to reappoint him was made. We decided to postpone until late 1983 a decision on three other judges so that we could better evaluate their performance. These judges are Republican Robert Seto, Independent Judith Yanello and Democrat John Wiese. The remaining judges are either uninterested in or unsuitable for reappointment.

II. Senator Dole's Objections

When Judges Merow, Yock and Colaianni were nominated for full 15-year terms last November and December, Representative Kastenmeier, whose subcommittee handled the Act in the House, communicated his objections to Senator Dole. Kastenmeier alleged that as part of the compromise that preceded passage of the Act, there was an agreement that eight of the 16 seats would be filled by President Reagan and eight by whomever is elected in 1984. Based on assurances by his Courts Subcommittee staff person, Pete Velde, that such an agreement was made, Senator Dole objected to Senate Judiciary Committee consideration of the three nominations. Dole's letter is at Tab 2. Seven vacancies will arise during the President's term, so the three reappointments would result in his filling ten of the 16 seats with judges who would serve full, 15-year terms.

The agreement limiting the President's appointment power was a well-kept secret. Neither Rep. McClory, ranking Republican on the Judiciary Committee, nor Rep. Railsback, ranking Republican on Kastenmeier's subcommittee, were aware of such a deal. Senator Thurmond also was unaware of it. After Dole raised his objections last month, McClory wrote a letter strongly contesting the existence of such an agreement. We recently received a copy of a letter from Kastenmeier, which says the expected things. Both letters are attached at Tab 3. The reappointment option was common knowledge around town; the D.C. Court of Claims bar formally recommended that the Administration reappoint all sitting judges immediately.

Even Senator Dole seemed unaware of the agreement. He wrote a letter urging the reappointment of Judge Seto, whose term expires in 1986, and whose wife works on Dole's staff. See Tab 4. Also, Judge Merow approached Pete Velde at a party in July and asked if there were any political reasons why Merow could not be reappointed at this time. Velde responded in the negative. Velde acknowledged the agreement only this fall, when he was negotiating with Kastenmeier's staff over a bankruptcy courts bill. Over White House objections, Velde was negotiating a provision to stagger bankruptcy court appointments into 1985. Kastenmeier's staff questioned Velde's ability to assure them that some appointments would be left to the President elected in 1984, and it appears that Velde felt it necessary to act on the Claims Court nominations to establish his authority.

After some digging, it appears that the agreement is less clear than is alleged. The House and Senate had passed bills that were different in many respects, including the section on the expiration of the judges' terms. Kastenmeier's staff person approached Velde with a chart, which showed that if compromise language the former had drafted were adopted, eight vacancies would arise this presidential term and eight the next. Each staffer took the language and this outcome to his principal and the two subcommittee chairmen approved. The issue of early reappointments was not discussed; in fact, they did not even discuss the impact of the death or retirement of a judge. The language drafted by Kastenmeier's staff actually resulted in seven vacancies this term and nine the next. Therefore, while the statute provided Kastenmeier with this favorable 7-9 split, it also allowed the unintended result of permitting early resignations and reappointments. In effect, Kastenmeier and his staff out-lawyered themselves.

III. Courses of Action

There are three courses of action open to the White House. It could:

(1) Limit the President to eight appointments.

(2) Push for a compromise with Dole, allowing for at least nine appointments.

(3) Proceed with unrestrained appointments and reappointments as originally planned.

The President already has made five appointments. Under the first option, we could forfeit filling the March 1984 vacancy, fill the February 1983 vacancy, and reappoint two of the three judges that were nominated last year. It is important to fill the February 1983 vacancy, because the judges serve until a successor is appointed and Judge Spector, whose term expires then, is highly biased against the government. Of course, if the Democrats signed off on any proposed reappointments, we would make them. Also, if a judge died in office or resigned early for a purpose other than reappointment, we would insist on retaining the right to fill the vacancy.

The second option would keep the 9-7 split that results from the language provided by Kastenmeier's staff person, but would turn it in our favor. However, if Dole refuses to agree, we are left with choosing between the other two alternatives.

The third option would be to assert the President's right to make whatever nominations he sees fit. We could refuse to agree to a limit on the President's power, but instead tell Dole to save his objections for the ninth nomination, if it ever

is made. Then, after eight appointments have been made and the bankruptcy courts issue has been resolved, we could decide whether to reappoint the sitting judges who are found to be qualified, and to fill the March 1984 vacancy. It is likely that the sitting judges to be reappointed would be a bipartisan group, including a Democrat, a woman, Colaianni, the court's acknowledged patent law expert, and Seto, who is Dole's favorite and an Asian-American. Dole could prevent the Judiciary Committee from reporting these nominees by joining a solid front of Democrats on an otherwise party line vote, but the likelihood of that occurring could be evaluated at that time.

IV. Conclusion

The course of least resistance is to accept Dole's 8-8 split, although we could negotiate for a 9-7 split and see if he will agree. Even after the bankruptcy courts issue is resolved, the White House would no doubt think twice about confronting the Chairman of the Finance Committee on an issue of relatively minor importance. On the other hand, the President's power to exercise his appointment power should not be dealt away by Senate staffers and any such agreement should not be deemed binding on the President. We could reject any agreement limiting the President to eight appointments, and postpone until fall a decision on whether or not to nominate a ninth judge. This course of action would assure that any agreement to limit the President's power to appoint bankruptcy judges would be reached only after consultation with the Administration.

Attachments:

1. List of expiration dates of terms of Claims Court judges
2. Letter from Sen. Dole to Sen. Thurmond
3. Letters from Rep. McClory to Sen. Thurmond and from Rep. Kastenmeier to Sen. Dole
4. Letter from Sen. Dole recommending Judge Seto

cc: Deputy Attorney General

Number of Years of Service of the Trial Judges of the U.S. Court of Claims as of 1981 and When Their Terms Now Expire Under H.R. 4482 As It Passed the House and Senate (3/9/82 and 3/22/82) (1)

		Years Already Served	Presidential Appointment
1)	Trial Judge Hogenson	30 years	Oct. 1, 1982
2)	Trial Judge Bernhardt	29 years	Oct. 1, 1982
3)	Trial Judge Fletcher	20 years	Oct. 1, 1982
4)	Trial Judge Willi	17 years	Oct. 1, 1982
5)	Trial Judge Spector	14 years	Feb. 1983
6)	Trial Judge Schwartz	14 years	Mar. 1983 (resigned 10/9/82)
7)	Trial Judge Wood	13 years	Mar. 1984
8)	Trial Judge Colaianni	12 years	May 5, 1985
9)	Trial Judge Harkins	11 years	Sept. 9, 1986
10)	Trial Judge Miller	10 years	Oct. 1, 1986
11)	Trial Judge Lydon	10 years	Oct. 1, 1986
12)	Trial Judge Weise	8 years	Oct. 1, 1986
13)	Trial Judge Yock (R)	5 years	Oct. 1, 1986
14)	Trial Judge Yanello	5 years	Oct. 1, 1986
15)	Trial Judge Merow (R)	4 years	Oct. 1, 1986
16)	Trial Judge Seto (R)	1 years	Oct. 1, 1986

* As passed, the Democrats expected 9 appointments (slots 9-16), leaving the Republicans with just 7 appointments (slots 1-7).

(2)

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

December 2, 1982

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
Washington, D.C. 20510

Dear Strom:

It has come to my attention that three current judges of the U. S. Claims Court, whose present terms of office expire on or before October 1, 1986, have been nominated or will shortly be nominated by President Reagan for full fifteen year terms on the Claims Court. This would be accomplished by the premature submission of resignations by these judges to create vacancies before the end of their present terms.

I have no information whatsoever of a derogatory nature with respect to any of these individuals and, so far as I know, all of them would be fully qualified for extended service on the Court. In my view, however, their premature appointments for new terms would violate the spirit of Section 167 of the Federal Courts Improvement Act of 1982. This section, as you recall, effected a political compromise between the leadership of the House and Senate Judiciary Committees so that eight of the sixteen judgeships on the Court would be appointed on or before October 1, 1984 and the balance thereafter. I am also convinced that the Justice Department has acted in good faith in this matter but did not appreciate the Congressional Compromise.

Therefore, without prejudice to any of the individuals involved, this is to inform you that I will object to further consideration of these nominations by the Senate Judiciary Committee. I deeply regret that this course of action becomes necessary but I feel honor bound to carry out the spirit as well as the letter of the law referred to above.

With best personal regards,

Sincerely,

BOB DOLE
Chairman, Courts Subcommittee
United States Senate

cc: Senators Biden, Heflin
Congressmen Rodino,
McClory, Kastenmeier,
Railsback
Attorney General Smith

(5)

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

December 10, 1982

Honorable Strom Thurmond
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I received a copy of Senator Dole's letter to you under date of December 2, 1982. That letter relates to the three recent Republican nominations made by our President to fill vacancies on the new U.S. Claims Court. In that letter Senator Dole lodged an objection, without prejudice, to further consideration of these nominations by the Senate Judiciary. His objection is based on two concerns, one that such appointments are premature and two, that they would violate a congressional compromise. I would like to address both of these concerns.

First, the "premature appointments." Three current judges of the U.S. Claims Court, whose present terms of office expire on or before October 1, 1986, have been nominated by our President for full fifteen year terms on the new court. This is being accomplished by the submission of resignations by these judges to create vacancies before the end of their present terms. In practice it would not seem workable to require service to the last day of each transition term, of the 16 persons then concerned. The legislation clearly states that "...such judge shall continue in office until a successor is sworn or until reappointed." Because the act so ends the transition term on "reappointment", I do not see where "premature appointments" are involved as stated in Senator Dole's letter.

Moreover, House Report 97-312, page 25 provides:

> They [Claims Court judges] will serve for initial terms that shall expire on October 1, 1986, but will be eligible for reappointment by the President to full fifteen-year terms. It is the expectation of the Committee that the President will carefully balance the twin obligations of providing adequate transition from the old to the new body, and at the same time, of selecting individuals to be judges on the basis of merit, regardless of race, sex, religion or national origin.

Second, with regard to the political compromise mentioned in Senator Dole's letter. According to that letter there exists "a political compromise between the leadership of the House and Senate Judiciary Committees so that eight of the sixteen judgeships on the court would be appointed on or before October 1, 1984 and the balance thereafter." I am not familiar with any such compromise. The discussions that occurred relating to the differences between House and Senate on Section 167 covered a range of issues and appointment possibilities. Although Section 167 was discussed it was not considered a serious point of disagreement between the two Houses. Therefore, it is difficult to understand why a serious political compromise would have been effected by that section.

The expiration dates of the transition terms of the 16 positions involved under Section 167 are as follows:

1.	Bernhardt	October 1, 1982
2.	Hoganson	October 1, 1982
3.	Fletcher	October 1, 1982
4.	Willi	October 1, 1982
5.	Spector	February 26, 1983
6.	Schwartz	March 11, 1983
7.	Wood	March 3, 1984
8.	Colianni	May 25, 1985
9.	Harkins	September 9, 1986
10.	Miller	October 1, 1986
11.	Lydon	October 1, 1986
12.	Wiese	October 1, 1986
13.	Yock	October 1, 1986
14.	Yannello	October 1, 1986
15.	Merow	October 1, 1986
16.	Seto	October 1, 1986

Subsequently, Bernhardt resigned and the Court of Claims appointed the present Chief Judge, Alex Kozinski, to this position so on the later effective date of the Act (October 1, 1982) Kozinski also had a transition term expiring on October 1, 1986.

Accordingly, on the assumption that each trial judge would serve to the last possible day of his or her transition term the following positions expire on or before October 1, 1984:

1. Bernhardt; 2. Hoganson; 3. Fletcher; 4. Willi;
5. Spector; 6. Schwartz; 7. Wood.

This makes only seven (7) pre-1984 and nine (9) post-1984. Clearly, this is not an "8 and 8" -- it would, in fact, have favored the administration coming in after 1984.

In practice, the Senate has already considered Alex Kozinski (who had a term expiring in 1986) and confirmed him for a 15-year term

and he has been designated Chief Judge. Seven additional names have been submitted for confirmation so that, to date, 8 have been submitted by the President as follows:

1. Kozinski
2. Margolis
3. Mayer
4. Gibson
5. Nettesheim
6. Yock
7. Colaianni
8. Merow

If there were an "8 and 8" compromise, it has not, as yet, been breached. If "7 and 9" is the compromise (the actual result under the Section 167 compromise theory apparently asserted in Senator Dole's letter) it would appear that there is no reason to object if the present Administration obtained the "9" side of the equation -- leaving room for still one more appointment.

With these three nominations in doubt the morale and the workload of this new court will be seriously affected. I am urging Senator Dole to reconsider his earlier objection.

Sincerely,

Robert McClory

cc: Hon. Robert Dole
Hon. Peter Rodino
Hon. Robert Kastenmeier
Hon. Tom Railsback
Hon. Howell Heflin
Hon. Joseph Biden
Hon. William French Smith

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

December 28, 1982

Honorable Robert Dole
Chairman, Subcommittee on Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Bob:

Thank you very much for sending me a copy of your December 2, 1982, letter to Chairman Strom Thurmond regarding our mutual understanding with respect to the appointment of judges to the new U.S. Court of Claims created pursuant to P.L. 97-164.

As you know, the House bill, H.R. 4482, provided that the present commissioners of the Court of Claims would serve until October 1, 1986, at which time the President would appoint judges for a full 15 year term.

The House Judiciary Committee Report, No. 97-312, emphasizes this point and specifies that the President is free to reappoint sitting commissioners to the new court. The specific purpose of the House language was to provide an adequate period of time -- at least four years -- for sitting commissioners to establish a record upon which their qualifications to be appointed to a full 15 year term could be based. It was intended that the record of the judge on the bench, not his ideological or partisan persuasion, was to be considered in his or her reappointment.

The language of the House report reflects the understanding of the House Committee. During the course of debate in the Committee, the ranking minority Member of the Subcommittee, Honorable Tom Railsback, specifically stated, in referring to the commissioners, "We actually grandfather them in for about a five-year period..." The House bill was approved by the Committee in 1981, thus accounting for Tom Railsback's reference to a five-year grandfather provision.

In working out our differences with the Senate-passed bill, we agreed to compromise by providing that half of the new judges would be appointed after 1984, thus promoting in large measure the policy of the House bill as reflected in the Committee Report and giving the Administration immediate appointment authority for some judges.

The artificial resignation and reappointment of judges prior to the expiration of their present terms specifically violates the understanding I, as the House manager of the bill, entered into with you as to the resolution of the differences between the House and Senate versions of the bill, and I commend you for recognizing our understanding in your letter to Chairman Thurmond. Should such legislative understandings continue to be abrogated by the Administration, I seriously doubt that the spirit of bipartisan cooperation which is reflected in H.R. 4482 and P.L. 97-164 can continue -- a spirit of cooperation to which the President made specific reference in his statements when signing the bill into law.

Warm regards,

Sincerely yours,

ROBERT W. KASTENMEIER
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:blr

cc: Hon. Joseph Biden
Hon. Howell Heflin
Hon. Peter Rodino
Hon. Robert McClory
Hon. Tom Railsback
Hon. William French Smith

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

August 20, 1982

William French Smith
Attorney General
Department of Justice
Constitution Avenue
Washington, D.C. 20530

Dear Mr. Attorney General:

It is my understanding that Robert Seto is under consideration for position of judge of the soon to be established United States Claims Court. He is currently a Commissioner of the United States Court of Claims. He also has experience as former patent counsel on the Senate Judiciary Committee.

His former employer Senator Fong has written to me urging my endorsement of Mr. Seto.

Although I have already written you to support the candidacy of others who aspire to this position, should additional vacancies occur in the near future it would be appreciated if you would carefully consider Mr. Seto.

With best personal regards,

Sincerely yours,

BOB DOLE
United States Senate

BD:pvp

82-1138

Received
OLP
8-25, 1982
JCR
cf:SJB File: Judges - Ct of Cl Claims
~~RLG~~
~~TJF~~

RECEIVED
AUG 23 1982
O. L. A.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

April 28, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Letter to the President from Alabama Attorney General Charles Graddick

General Graddick has written the President to note his opposition to the Chief Justice's proposal to create a temporary national court of appeals. Graddick argues in his letter that the proposal treats only a symptom and not the more serious problem of the federal litigation explosion. In suggesting more significant reform, Graddick focuses on abuse of habeas corpus by state court prisoners, praising the Administration proposals but asserting that reform has become a "very low priority" in the Administration and requires the President's personal involvement. Graddick then calls for limiting § 1983 suits, and requiring every bill considered by Congress to carry a "judicial impact" statement. Graddick concludes by citing the general problem of judicial activism and the need to appoint judges who are more restrained.

As you know, we have not yet taken a position on the Chief's proposal. All we can tell Graddick is that Justice is looking at the proposal and that we will make his views known to the appropriate individuals. Graddick's criticism of our habeas corpus effort is unfair and can be dismissed by noting that habeas reform is a prominent part of the new crime package. Justice has been looking into several avenues of § 1983 reform -- § 1983 abuse really has become the most serious federal court problem -- but the general sense is that it would be impolitic to touch the provision, which authorizes most actions for civil rights violations, until after 1984. Our record in resisting judicial activism is, of course, quite good.

I have drafted a reply to Graddick for your signature, sympathetically sharing his concerns, and advising that Justice is reviewing the Chief's proposal and that you have forwarded his letter to Justice for appropriate consideration. Also attached is a cover memorandum to the Deputy Attorney General.

Attachments

THE WHITE HOUSE

WASHINGTON

April 28, 1983

Dear General Graddick:

Thank you for your letter of March 10 to the President. In that letter you noted your opposition to the Chief Justice's proposal to create a national court of appeals, reasoning that such a court would treat only a symptom of a much larger and more serious problem. In particular, you focused on the causes of the litigation explosion in the federal courts, including abuse of habeas corpus by state prisoners, the increase in § 1983 filings, enactment of legislation without regard for judicial consequences, and the tendency of some federal judges to exceed the limited role envisioned for them by the Framers.

The Administration has not yet taken a position on the proposal of the Chief Justice. A working group within the Department of Justice is currently reviewing the question. I will see to it that your views are made known to the Department, so they may be given every appropriate consideration throughout the process of developing our position.

I think you know that this Administration shares your concern about the root causes of the explosion in federal litigation, and that we are trying to do something about them. Our habeas corpus reform proposal, designed to restore federal-state comity and the finality of state court convictions, has been resubmitted to Congress as an integral part of the proposed Comprehensive Crime Control Act of 1983. Your suggestion that Congress be required to consider the judicial impact of proposed legislation is intriguing; for the present we make every effort to examine legislation from this critical perspective to avoid increasing the litigiousness of our society. The burden imposed by abuse of § 1983 is becoming intolerable, and we are examining what can be done to alleviate the problem without undermining the historic role of § 1983 in vindicating Constitutional rights.

I agree with your conclusion that judicial activism is the basic cause of the litigation burden on the federal courts. So long as courts view themselves as appropriate forums for resolving all of society's problems, they will, quite understandably, be overloaded. This is not the role envisioned by the Framers for the Third Branch. As you know,

Attorney General Smith has on frequent occasions articulated the Administration's program to promote the values of judicial self-restraint. This program includes resisting arguments in litigation that invite judicial activism, and appointing to the bench qualified men and women who recognize the limited nature of the judicial role.

Thank you for providing us with your considered views on these serious matters. I think it is evident that we share your concerns. We are committed to restoring faith in the federal court system, and protecting it from the abuses that threaten to overwhelm it.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Charles A. Graddick
Attorney General
State of Alabama
64 North Union Street
Montgomery, Alabama 36130

FFF:JGR:aw 4/28/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

April 28, 1983

MEMORANDUM FOR EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Correspondence from Attorney General Graddick of Alabama

I attach for whatever consideration you deem appropriate a letter to the President from General Graddick, and a copy of my reply.

Attachment

FFF:JGR:aw 4/28/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 131630 CU

FG052

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Charles A. Braddick

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Proposed National Court of Appeals to assist the Supreme Court with its caseload

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHolland	ORIGINATOR DD	83/04/04			1 1
CWAT18	Referral Note: D DD	830404			83/04/14
	Referral Note:	1 1			1 1
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

OFFICE OF THE ATTORNEY GENERAL

CHARLES A. GRADDICK
ATTORNEY GENERAL
STATE OF ALABAMA

JAMES R. SOLOMON, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM M. BEKURS, JR.
EXECUTIVE ASSISTANT

WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL

JANIE NOBLES
ADMINISTRATIVE ASSISTANT

ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 834-5150

March 10, 1983

131630 AA

The Honorable Ronald R. Reagan
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Proposed National Court of Appeals to Assist the Supreme Court with its Caseload

Dear President Reagan:

As you know, Chief Justice Burger has proposed the creation of a national court of appeals as a temporary or experimental procedure for reducing the United States Supreme Court's burgeoning caseload. While I share the Chief Justice's concern about the problem, I disagree with his proposed solution and would like to take this opportunity to outline my reasons.

My basic objection to the national court of appeals proposal is that it is a remedy which would treat only a symptom of a much larger and more serious problem. The Supreme Court's increasing workload simply reflects the enormous growth in federal court litigation in recent years which is the real malady. As the Chief Justice has noted, in the past three decades the caseload of lower federal appellate courts has increased more than 16 times faster than this country's population.

A recent study, reported in the journal of one of the American Bar Association's sections, reached some alarming conclusions about the rate at which federal court litigation is growing. According to that study, if the growth rate

continues unabated, in three decades the federal appellate courts alone will be rendering one million decisions annually. That will require 5,000 federal appellate judges instead of the fewer than one hundred and fifty we have now, and their decisions will fill 1,000 federal reporter volumes a year, approximately the same number that have been filled in the previous two centuries of the Republic. The journal also predicted that three decades from now 10 million new cases will be filed in the federal trial courts each year.

Creating another layer of federal courts will do nothing to rescue this country from the grave danger of having its political, social, and governmental institutions submerged in a flood of federal litigation. Indeed, history suggests that additional courts may actually result in more litigation because of complex institutional reasons that have more than a little to do with human nature. Adding another level of litigation to the federal court system to relieve the case overload is somewhat like giving an addict one more fix. It may relieve his pains for a short while but in the long run it only postpones the ultimate day of reckoning and increases the problem that will have to be faced then.

Only by examining the causes for the enormous increase in federal court litigation can meaningful, long term solutions to the problem be found. One cause is the tremendous number of habeas corpus petitions filed in federal courts by state prisoners each year. Even prisoners whose guilt is clear and undisputed routinely challenge their state court convictions on technical grounds in federal courts. The hospitality federal courts show to state prisoners and their readiness to overturn state judgments on tenuous grounds have undermined federal-state comity and utterly destroyed any notion of finality of judgment. Federal judge-made law provides that there is no absolute bar to overturning a state court conviction ten, fifteen, or twenty years after it was entered, and federal courts can do so even though the prisoner has unsuccessfully challenged it on identical grounds two or more times before. It is no wonder that prisoners inundate the federal courts with habeas corpus petitions, since they have nothing to lose and everything to win as the law stands now.

The federal habeas corpus reform bill that your administration proposed last year would go a long way towards remedying the major problems in this area and as a result would ease some of the current burden on the federal courts. The problem is that federal habeas corpus reform has apparently become a very low priority of your administration, and reform will come only if you personally emphasize its importance and work for passage of meaningful legislation such as that which has been proposed by your administration.

Another reason federal courts are overburdened is the incredible number of §1983 federal civil rights cases filed by state prisoners. Such cases have increased more than four-fold in the past decade. In some areas they constitute a very significant part of the federal court caseload. For example, in the middle district of Alabama, for the twelve month period ending September 30, 1981, one out of every three cases filed in the federal trial court was a §1983 action. The vast majority of such actions are filed pro se by state prisoners who had nothing better to do than harass the state officials required to answer the lawsuits. Indeed, some prisoners have filed more than a dozen §1983 lawsuits. Every objective observer argues that 99% or more of these filings are frivolous and that it is difficult to weed out the few meritorious ones because they get buried in all the others.

Not only are §1983 filings choking the federal trial courts but they are also creating a serious financial burden on the states who are forced to respond to them. My office alone spends nearly a half million dollars each year responding to these frivolous lawsuits, not one out of a hundred of which has any basis. Badly needed statutory reform could alleviate much of the problem. For example, a simple provision that no state prisoner can have his §1983 complaint considered until he has exhausted his state administrative remedies and that a full and fair state determination of the matter is conclusive would remove virtually all of these frivolous lawsuits from federal court. Only Congress can enact such reform, but your administration must provide the leadership needed on the issue.

A third cause of the federal court litigation explosion is the fact that each year Congress enacts thousands of bills without any regard to the effect that such legislation will

have on the federal courts or on the cost of litigation. Serious consideration should be given to a requirement that every bill considered by Congress carry a statement of its expected effect on the judicial system and an estimate of the annual cost of litigation that will result from any new rights or rules contained in the bill.

Finally, a more general cause of the workload crisis that federal courts are facing is the fact that they are increasingly becoming forums for the resolution of political and social issues once reserved for more democractic institutions or for the electorate itself. The history of federal courts has taught us that most life-tenured judges who have the raw power to impose their social and political views on others will eventually attempt to do so.

One of many examples of this phenomenon is in the area of capital punishment. No majority of the Supreme Court has ever held capital punishment to be per se unconstitutional; thirty-nine states have capital punishment statutes; and over eleven hundred murderers are on death row. Yet, the federal courts have allowed only two murderers to be executed against their will in the past 15 years. A substantial majority of federal appellate judges are personally opposed to capital punishment. As a result, they have misused their judicial power to fashion doctrines that have indirectly virtually abolished a punishment which the same judges acknowledge is constitutionally permissible. The only remedy for this kind of activist judicial abuse is through the power of appointment of federal appellate judges, a power which only you have. Your appointment of Justice O'Connor was an excellent one, and I sincerely hope that it will be followed by others of similar quality.

Please understand that my observations are in no way directed at Chief Justice Burger. Indeed, he has recognized many of the problems discussed in this letter and has worked hard in attempting to remedy them. Without him the problems would be much worse, but he needs the kind of help with Congress that only your active involvement can provide.

I disagree with the Chief Justice's national court of appeals proposal simply because I think it would treat only one symptom of a very serious malady. If any reasonable

semblance of the judicial system intended by the Founding Fathers is to survive, the underlying malady itself must be treated.

In addition, if there is to be a national court of appeals, even as a temporary institution, then I hope that appeals involving federal court review of state court judgments will be removed from its jurisdiction. Otherwise, the 6 to 8 years it now takes to have a state conviction reviewed in both state and federal courts will become 8 to 10 years. There will be yet another layer of federal judges before whom a convicted state defendant can take his case and delay the ultimate day of reckoning.

Thank you for your consideration, and please let me know if I can ever be of any assistance to you.

Sincerely,

Charles A. Graddick

CHARLES A. GRADDICK
Attorney General

CAG:ec

cc: Chief Justice Burger